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No. 06-674

IN THE
Supreme Court of the United States

DONALD BRADFISCH; VINCE KWIATKOWSKI; EDMUND WOODBURY; AND JOSEPH PARISE, JR., AS TRUSTEE OF THE ICON MECHANICAL CONSTRUCTION AND ENGINEERING 401K RETIREMENT SAVINGS PLAN,
Petitioners,

v.

TEMPLETON FUNDS, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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Respondents do not dispute that a GVR is an appropriate disposition of this case. Respondents also do not contest that the Court should order full briefing on remand – and for good reason. It is undisputed that, without permitting petitioners to file even an opening brief in their appeals, the Seventh Circuit summarily affirmed the district courts' judgments of dismissal on the authority of a case this Court vacated a month later. *See Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145 (2006) (vacating *Kircher v. Putnam Funds Trust*, 403 F.3d 478 (7th Cir. 2005) ("*Kircher II*")). Not only did this Court vacate *Kircher II*, it also pointedly noted that the rationale of *Kircher II* – which was the explicit basis of the summary disposition of these four cases – was "not binding" and "open to consideration on remand." 126 S. Ct. at 2157 & n.15. At a minimum, therefore, by longstanding practice this Court should grant the petition, vacate the judgment below, and remand these cases for full briefing and further consideration in light of *Kircher*, so that petitioners obtain the benefit of this Court's vacatur of a Seventh Circuit precedent on which the decision below was based.

Rather than contest a GVR, respondents raise two minor objections to this Court's plenary review of the questions presented in the petition. Those questions, which independently warrant certiorari, involve the Seventh Circuit's denial of petitioners' due process rights and refusal to apply the time limit for removal in 28 U.S.C. § 1446(b). Respondents first claim that, as a factual matter, the court of appeals afforded petitioners adequate notice and an opportunity to be heard before summarily disposing of their appeals. Second, they contend that petitioners waived their argument that SLUSA removals are governed by the time limit for removal in the general removal statute, 28 U.S.C. § 1446(b).

Neither assertion has any merit. Before summarily affirming the dismissals of petitioners' claims, the Seventh Circuit stayed proceedings in these appeals pending this Court's consideration of the petition in *Kircher*, *see* Pet. App. 14a-15a; consolidated petitioners' four cases with

nine others, *see id.* at 25a; and directed counsel for the parties to file "short statements" discussing the effect of this Court's decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503 (2006), on all the appeals, Pet. App. 29a. The order did not request full briefing on the issues that each of the 13 appellants intended to raise on appeal and gave no indication that the court would rule dispositively on the appeals based on nothing more than the "short statements." But that is precisely what the court did, contrary to bedrock principles of due process.

Respondents' second contention is similarly flawed. The notion that petitioners "failed to address the issue of removability of the cases under SLUSA," Br. in Opp. 3, is unfounded. Petitioners' primary contention before the district court and the court of appeals was that these cases should be remanded because the general removal statute is "the exclusive authority for effectuating the removal of a case," even removal under SLUSA, 15 U.S.C. § 77p(c). Mem. in Support of Pl.'s Mot. To Remand Pursuant to 28 U.S.C. § 1447(d), at 2, *Bradfisch v. Templeton Funds, Inc.*, No. 3:05-CV-00298-MJR (S.D. Ill. filed May 23, 2005) ("*Bradfisch* Remand Mot."). As this Court confirmed in *Kircher*, the general removal statute governs the procedure for all removals absent clear congressional direction to the contrary (which is lacking here). *See* 126 S. Ct. at 2153 & n.8.

I. THIS COURT SHOULD, AT A MINIMUM, GRANT THE PETITION, VACATE THE JUDGMENT BELOW, AND REMAND WITH INSTRUCTIONS FOR FULL BRIEFING

It is undisputed that the Seventh Circuit principally relied on its subsequently vacated decision in *Kircher II* to affirm summarily the dismissal of petitioners' claims. *See* Pet. App. 2a ("On the authority of *Dabit* and *Kircher [II]*, the judgments are affirmed."). The Seventh Circuit declared on rehearing that petitioners "could obtain relief only if this court were prepared to reexamine the holding

of *Kircher II*." *Id.* at 31a-32a. That is precisely what this Court's vacatur of *Kircher II* now requires the Seventh Circuit to do. *See Kircher*, 126 S. Ct. at 2157 n.15 (holding that *Kircher II*'s characterization of petitioners' negligence claims as disguised fraud claims "is not binding in future proceedings and is open to consideration on remand"). This Court should therefore grant the petition, vacate the judgment below, and remand for further consideration in light of *Kircher*. Respondents do not dispute that submission.

The only other arguable basis for the Seventh Circuit's judgment – *Dabit* – cannot bear the weight placed on it by the court of appeals. The court believed that *Dabit* "approved" the Seventh Circuit's reasoning in *Kircher II*. Pet. App. 2a; *id.* at 32a. But *Dabit* did no such thing: that case involved explicit allegations of fraud – a contention necessary for SLUSA removal, *see* 15 U.S.C. § 77p(c), but absent from these cases, *see* Pet. 28; Pet. App. 33a-53a. Both these cases and *Kircher* concern *negligence* claims that fall outside of SLUSA's ambit.

This Court can reasonably expect that, with a GVR, the court below will properly remand these cases. After its decision below, and in light of this Court's decision in *Kircher*, the Seventh Circuit sent substantively identical, procedurally similar cases back to state court, including one that involved defendants that, like respondents here, did not appeal the 2003 remand orders. *In re Mutual Fund Market-Timing Litig.*, 468 F.3d 439 (7th Cir. 2006). Like respondents here, the defendants there removed a second time from state to federal court and did so at the same time on the same grounds that respondents here sought a second removal. Rather than summarily dispose of the case, the Seventh Circuit considered post-*Kircher* briefing and then reasoned that the 2004 remand was conclusive. *See id.* at 443.

Thus, at a minimum, the Court should grant, vacate, and remand these cases for further consideration in light of *Kircher*. Furthermore, because of the Seventh Circuit's

violations of petitioners' due process rights, this Court should direct the Seventh Circuit on remand to order full briefing and to give petitioners their full appellate rights. *See* Pet. 29.

II. THE COURT OF APPEALS' SUMMARY AFFIRMANCE FAILED TO PROVIDE MEANINGFUL REVIEW, IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

A. The Due Process Clause indisputably guarantees litigants fair notice and a meaningful opportunity to be heard. *E.g.*, *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 468 (2000); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). A court deprives litigants of that notice and opportunity when it dismisses a case "without at least giving plaintiffs notice of the proposed action and affording them an opportunity to address the issue." *Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 30 (1st Cir. 2000) (internal quotation marks omitted); *see* Pet. 17-18 & n.18. The Seventh Circuit violated those bedrock principles of due process when it summarily affirmed the dismissal of petitioners' claims without giving petitioners an opportunity to brief their grounds for reversal. *See* Pet. 13-17.

B. 1. Respondents contend, however, that the court of appeals' March 23, 2006 order provided adequate notice and opportunity to present grounds for reversal. *See* Br. in Opp. 1. But the March 23 order did no such thing – it directed the parties only to submit "short statements" about *Dabit*'s "effect on these appeals." Pet. App. 29a. That order did not notify petitioners that the court was considering denying them a right to present their briefs and arguments on the merits of their appeals through a summary affirmance. Due process requires far more notice than that. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 632 (1962).

Nor did the March 23 order give petitioners the opportunity to present their grounds for reversal. By its express terms, the order confined the parties' responses to

a "short statement" on the significance of *Dabit*. Pet. App. 29a. Even if petitioners had been on notice that their entire appeals were at stake, the opportunity to file a "short statement" was not a meaningful opportunity to be heard under the circumstances. At that time, the consolidated cases, which presented different issues, were stayed pending this Court's disposition of *Kircher*. Petitioners had not been afforded any opportunity to articulate their issues on appeal, they were given only 10 days to file the statement, and they were admonished to keep it "short." *Id.*

2. Respondents also sprinkle references throughout their brief to alleged "tactical reasons" and a purported "strategy of evasion" by petitioners, suggesting a deliberate strategy not to apprise the Seventh Circuit of their multiple, independent grounds for reversal. Br. in Opp. 1, 2, 5. That assertion defies common sense. No rational appellate strategy could lead an appellant to forgo the opportunity to advise the appellate court of the reasons for reversal, and nothing in the record supports the claim that petitioners adopted such an irrational "tactic." Petitioners reasonably interpreted the order to mean what it said: that the court wanted to know only the effect of *Dabit* on the then-stayed appeals.

3. Finally, respondents claim that petitioners' motions for rehearing, vacatur, and recall of the mandate gave them an adequate opportunity to be heard. *See id.* at 2. Critically, all of those filings came only *after* the court of appeals had reached its decision to summarily affirm. In addition, a rehearing petition does not constitute an opportunity to be heard "in a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), particularly when the standard for granting rehearing is more stringent than a court's initial review. *See* Pet. 16-17.

Petitioners' other filings responded to events subsequent to the court of appeals' denial of rehearing. Specifically, the motion to vacate the order denying rehearing apprised the court of appeals that this Court had vacated

Kircher II on the same day that the Seventh Circuit denied rehearing in these cases on the basis of *Kircher II*. Petitioners' motion to recall the mandate followed the Seventh Circuit's decision in *Mutual Fund Market-Timing*, and explained that, there, the Seventh Circuit had ordered a return to state court in a case that is materially indistinguishable from these cases.[1]

III. BY DECLINING TO APPLY 28 U.S.C. § 1446(b) TO CASES REMOVED UNDER SLUSA, THE COURT OF APPEALS DEPARTED FROM DECISIONS OF THIS COURT AND OTHER CIRCUITS

The court of appeals declined to apply the 30-day time limit on removal in 28 U.S.C. § 1446(b) to these cases, which were removed under SLUSA's removal provision, 15 U.S.C. § 77p(c). Petitioners filed motions to remand challenging the removals as untimely, and the district court agreed that they were untimely under § 1446(b). Pet. App. 6a, 11a. The district court nevertheless concluded that the § 1446(b) time limits do not apply to SLUSA removals, and that the cases were therefore properly within its removal jurisdiction. *See id.* at 7a, 11a. The Seventh Circuit ignored this threshold jurisdictional issue and proceeded to the merits. In so doing, the court

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[1] In *Mutual Fund Market-Timing*, the Seventh Circuit held that defendants that (like respondents here) failed to appeal remand orders were bound by those orders and could not remove again. *See* 468 F.3d at 443. The court acknowledged that "[p]laintiffs might have been able to say much the same thing in the *Bradfisch* suits, for the defendants in those four cases also had removed in 2003 and failed to appeal from the remand orders." *Id.* at 444. But it stated that it affirmed the dismissals in these cases rather than ordering remand because "no such argument had been raised." *Id.* That statement was erroneous. The motions to remand in these cases presented the same arguments as the motions that persuaded the Seventh Circuit in *Mutual Fund Market-Timing* – indeed, they were filed by the same counsel. *Compare, e.g.*, *Bradfisch* Remand Mot. *with* Mem. in Support of Pl.'s Mot. To Remand Pursuant to 28 U.S.C. § 1447(d), *Parthasarathy v. T. Rowe Price Int'l Funds, Inc.*, No. 05-CV-302-DRH (S.D. Ill. filed May 23, 2005).

erred and created a conflict with decisions of this Court and other circuits.

As this Court confirmed last Term, when Congress enacts a statute that permits removal, but does not specify the procedures to be followed, the general provisions in Title 28 governing removal and remand apply. *See, e.g.*, *Kircher*, 126 S. Ct. at 2153 & n.8; *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995); *United States v. Rice*, 327 U.S. 742, 748 (1946). Because SLUSA's removal provision – like many others Congress has enacted, *see* Pet. 22 n.21 – does not specify the time for removal, § 1446(b)'s 30-day time limit governs removal under § 77p(c). *See* Pet. 19-22.

Rather than defending the court of appeals' decision on the merits, respondents argue (at 5-6) that petitioners failed to raise the timeliness issue in the district courts and the court of appeals. The record refutes that claim. In the district courts and on appeal, petitioners explicitly contended that the cases should be remanded to state court because respondents did not remove within the time required by § 1446(b). *See* Pet. 8 & n.8 (citing remand orders), 23-24 & n.23 (citing rehearing petition).[2] Respondents cannot explain how the courts below could have been ignorant of petitioners' position that § 1446(b) applies in these cases.

Respondents also dispute the existence of a circuit conflict on the applicability of the general removal statute to SLUSA removals. *See* Br. in Opp. 6. But other circuits

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[2] Petitioners' failure to include the § 1446(b) argument in their "short statement" filed in response to the March 23 order – which sought only the parties' positions on the effect of *Dabit* on these cases – cannot constitute waiver. A party cannot waive an argument it had no opportunity to make. *See EEOC v. Indiana Bell Tel. Co.*, 256 F.3d 516, 526-27 (7th Cir. 2001). In any event, the waiver doctrine is discretionary, *see Singleton v. Wulff*, 428 U.S. 106, 121 (1976), and courts ought to address purely legal issues – even when raised for the first time on appeal (which was not the case here) – when doing so does no harm to the court or any party, *see Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 749 (7th Cir. 1993) (Posner, J.).

have applied § 1446(b)'s time limits to special removal statutes that, like § 77p(c), lack their own timing rules. *See* Pet. 24-25. Aside from their unreasoned and unsupported claim that SLUSA is a "unique statute" that "cannot be interpreted by analogy to any other statute," Br. in Opp. 6-7, respondents articulate no distinction between SLUSA and the removal statutes at issue in cases that properly applied § 1446(b)'s timeliness rules. *See* Pet. 24-25 (discussing *Allen v. Christenberry*, 327 F.3d 1290, 1295 (11th Cir. 2003); *FDIC v. Loyd*, 955 F.2d 316, 325 (5th Cir. 1992); *Woburn Five Cents Sav. Bank v. Robert M. Hicks, Inc.*, 930 F.2d 965, 968 (1st Cir. 1991)). Moreover, respondents fail to acknowledge the Eleventh Circuit's explanation that, when a defendant removes a case *under SLUSA*, "[t]he legal requisites of removal are found in the removal statutes and include, *inter alia*, those enunciated in . . . § 1446(b) (the timeliness requirement)." *Williams v. AFC Enters., Inc.*, 389 F.3d 1185, 1187 n.5 (11th Cir. 2004) (internal quotation marks omitted). Had the court below applied the reasoning of those circuits to the facts here, the outcome of this case unquestionably would have been different.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should grant the petition, vacate the court of appeals' judgment, and remand with instructions to order full briefing.

Respectfully submitted,

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